No. 86-694

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE STATE OF CALIFORNIA,
Petitioner,

v.

BILLY GREENWOOD AND DYANNE VAN HOUTEN,
Respondents.

On Writ Of Certiorari To The
Court Of Appeal Of California,
Fourth Appellate District, Division Three

BRIEF FOR RESPONDENT BILLY GREENWOOD

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QUESTION PRESENTED

Do warrantless searches of closed trash containers violate the Fourth and Fourteenth Amendments?

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STATEMENT OF CASE

This case involves a series of warrantless controlled pickups of the trash, at the home of Respondent Greenwood. On various occasions between February and May, 1984, officers of the Laguna Beach Police Department waited until Respondent Greenwood placed his garbage at the street for collection; the officers made arrangements with the trash collector to put Greenwood's garbage aside, not to intermingle it with other collected trash, and to deliver said trash to the officers. (J.A. 4-5; 7-8). The trash had been placed out for collection, apparently on its regular pick up day, and was in dark plastic trash bags. There is no evidence that the trash could be seen through the dark plastic bags prior to the time they were opened. (J.A. 6; 32-33; 40-41). It appears that Respondent Greenwood's trash had been monitored between February and April of 1984. (C.T. 112-113.)

Search warrants were issued on April 6, 1984, and May 6, 1984, based in large part on the fruits of the trash searches.

SUMMARY OF ARGUMENT

Two search warrants were issued for Respondent Greenwood's residence based in large part on a series of controlled trash pick ups and subsequent searches of Respondent's trash. The trash searches were conducted without warrants and without any claim of exigency. (C.T. 82)

Respondent respectfully contends that the trash searches were invalid and violated Respondent's reasonable expectation of privacy under the Fourth and Fourteenth Amendment to the United States Constitution.

Respondent Greenwood further contends that his expectation of privacy must be considered legitimate and

reasonable within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution because of the impact of state law establishng a right of privacy as to trash placed out for collection.

ARGUMENT

CONTROLLED TRASH PICK-UP, ACCOMPLISHED WITHOUT BENEFIT OF A WARRANT OR PROBABLE CAUSE, VIOLATED RESPONDENT'S REASONABLE EXPECTATION OF PRIVACY.

In order to properly address the issues presented by this case, it is first necessary to properly define the precise question posed by the proposition herein advanced by Petitioner and Amici Curiae. For the issue herein is not merely that of whether or not a criminal suspect's trash may be searched; the issue more accurately defined is that whether or not any citizen's garbage, contained in opaque plastic garbage bags (J.A.[1] 6), may be seized by law enforcement officials and searched without a search warrant, without probable cause, and without any claim of exigency.

Petitioner, as well as amici curiae, contend that such police conduct is valid, not because it is in some sense necessary to the preservation of a well-ordered society, but because trash is to be viewed as "abandoned" property, deserving of no Fourth Amendment protection whatsoever.

The serious Constitutional infirmity inherent in the police conduct involved in this case, and in the argument of Petitioner and Amici Curiae, lies in its misdirected focus on the nature of the trash itself, rather than the privacy interests of the citizen whose trash is involved,

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[1] J.A. refers to Joint Appendix.

and the reasonable expectations of a citizen who places his garbage out for collection in opaque closed containers. As noted by Justice White in his recent dissenting opinion in *California* v. *Rooney* 483 U.S. ___, 107 S.Ct. 2852, 2859 (1987):

> The primary object of the Fourth Amendment is to protect privacy, not property, and the question in this case, as the Court of Appeal recognized, is not whether Rooney had abandoned his interest in the property sense, but whether he obtained a subjective expectation of privacy in his trash bag that society accepts as objectively reasonable.

And in the dissenting opinion in *Rooney*, the revealing nature of garbage was specifically noted. *California* v. *Rooney, supra*, at 483 U.S. ___, n.3; indeed, an entire lifestyle can be well-determined from an examination of a citizen's trash. See, Rathje, "Archeological Ethnography. . . . Because Sometimes It Is Better To Give Than To Receive," in Explorations in Ethnoarchaeology, 49 (R. Gould ed. 1978). Certainly, a periodic examination of a person's eating preferences, drinking habits, literary interests, political associations, and occasionally, private thoughts, can be revealed by an examination of his trash.

Further, the magnitude of the invasion of privacy involved in controlled trash pick-ups is evident in the present case. For Petitioner herein seeks to justify not just a one-time examination of discarded refuse, but a periodic and perhaps systematic *monitoring* of that trash, that may have involved numerous seizures over a two month period. (See, J.A. 20; 54-55; C.T.[2] 150-151; see 112-113) Petitioners seek to justify this monitoring in the

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[2] C.T. refers to clerk's transcript.

absence of a search warrant, probable cause, or any claim of exigency.

Were this Court to adopt, for the first time, the proposition advanced by Petitioner, the Court would thereby authorize the uncontrolled systematic monitoring by the Government of citizens' lifestyles and attitudes. Such an approach cannot rationally be harmonized with accepted Fourth Amendment principles.

To allow the Government an unfettered and free rein to monitor the activities of private citizens, without the intervention of a neutral and detached magistrate, clearly violates the Fourth Amendment's warrant requirement. As noted in the case of *Steagald* v. *United States*, 451 U.S. 204, 212 (1981):

> The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search. As we have often explained, the placement of this check point between the Government and the citizen implicitly acknowledges that an "officer engaged in the often competitive enterprise of ferreting out crime," *Johnson* v. *United States*, *supra*, at 14, 92 L.Ed. 436, 68 S.Ct. 367, may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interest in protecting his own liberty and the privacy of his home. *Coolidge* v. *New Hampshire*, *supra*, at 449-451, 29 L.Ed.2d 564, 91 S.Ct. 2022; *McDonald* v. *United States*, 335 U.S. 451, 455-456, 93 L.Ed. 153, 69 S.Ct. 191 (1948)

Petitioner, however, would have this court hold inapplicable these constitutionally compelled principles, by defining the nature of the property involved to be such that it is deserving of no constitutional protection what-

ever. This analysis misdirects the focus to the property, rather than the privacy interest involved.

As stated in the majority opinion in *California* v. *Ciraolo*, 476 U.S. ___, ___, 106 S.Ct. 1809, ___ (1986):

> The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz* v. *United States*, 389 U.S. 347, 360, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), (Harlan, J., concurring). *Katz* posits a two part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? See *Smith* v. *Maryland*, 442 U.S. 735, 740, 61 L.Ed.2d 220, 99 S.Ct. 2577 (1979).

In the present case, as noted in more detail, *infra*, Respondent exhibited an expectation of privacy; that expectation, contrary to the argument of Petitioner and Amici Curiae, is one which society ought properly to recognize, and protect.

Authorities dealing with this issue are not in agreement.

Petitioner and Amici Curiae cite a plethora of Federal Circuit Court decisions holding that there is no reasonable expectation of privacy in garbage which has been set out for collection. (*United States* v. *Mustone* (1st Cir. 1972) 469 F.2d 970; *United States* v. *Terry* (2nd Cir. 1981) 702 F.2d 299, cert. den. 461 U.S. 931; *United States* v. *Reicherter* (3rd Cir. 1981) 647 F.2d 397; *United States* v. *Crowell* (4th Cir. 1978) 586 F.2d 1020, cert. den. 440 U.S. 959; *United States* v. *Vahalik* (5th Cir. 1979) 606 F.2d 99 (cert. den. 606 U.S. 1081); *Magda* v. *Benson* (6th Cir. 1976) 536 F.2d 111; *United States* v. *Shelby* (7th Cir. 1978) 573 F.2d 971 (cert. den. 439 U.S. 975); *United States* v.

Dela Espirella (9th Cir. 1986) 781 F.2d 1432; *United States* v. *O'Bryant* (11th Cir. 1985) 775 F.2d 1528.)

But these decisions, as well as those of the state courts upon which Petitioner relies, (see *People* v. *Huddleston* (1976) 38 Ill. App.3d 277, 347 N.E.2d 76; *Smith* v. *State* (1973 Alaska) 510 P.2d 793; *State* v. *Fassler* (1972 Arizona) 503 P.2d 807; *Croker* v. *State* (1970 Wyoming) 477 P.2d 122; *State* v. *Purvis* (1968 Oregon) 438 P.2d 1002; *People* v. *Whotte* (1982 Michigan) 317 N.W.2d 266; *State* v. *Oquist* (1982 Minnesota) 327 N.W.2d 587; *State* v. *Brown* (1984 Ohio) 484 N.2d 215; *State* v. *Stevens* (1985 Wis.) 367 N.W.2d 788; *State* v. *Schultz* (1980 Fla.) 388 So.2d 1326.) have almost uniformly defined the issue in terms of abandonment, without any extended analysis of the privacy issues involved.

By contrast, the California Supreme Court in the case of *People* v. *Edwards*, 71 Cal.2d 1096 (1969), analyzed the rationale for finding a reasonable expectation of privacy in refuse. In so holding a unanimous Court noted, *Id.* 71 Cal.2d at 1104:

> We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. Half truths leading to rumor and gossip may readily flow from an attempt to "read" the contents of another's trash.

Two years later, a divided California Supreme Court applied the *Edwards* principle in *People* v. *Krivda* 5 Cal.3d 357 (1971). In so holding, the Court noted, *Id.*, 5 Cal.3d at 366-367:

The placement of one's trash barrels into the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public. To the contrary, many municipalities have enacted ordinances which restrict the right to collect and haul away trash to licensed collectors, whose activities are carefully regulated. (See, e.g., Los Angeles County Ord. No. 5860. ch. IX, §§ 1611-1622, 1681-1691.) Moreover, these ordinances commonly prohibit unauthorized persons from tampering with trash containers. (*Id.*, § 1710.) The provisions of these ordinances would appear to refute the view that the contents of one's trash barrels become public property when placed on the sidewalk for collection.

Aside from municipal ordinances, there may exist an additional element of expected privacy whenever one consigns his property to the trash can, to be dumped, destroyed and forgotten. As stated in *Edwards*, "The marijuana itself was not visible without 'rummaging' in the receptacle. So far as appears defendants alone resided at the house. In the light of the combined facts and circumstances it appears that defendants exhibited an expectation of privacy, and we believe that expectation was reasonable under the circumstances of the case. We can readily ascribe many reasons why residents would not want their castaway clothing, letter, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, *at least not until the trash had lost its identity and meaning of becoming part of a large conglomeration of trash elsewhere*. Half truths leading to rumor and gossip may readily flow from an attempt to 'read' the contents of another's trash." (Italics added; *People* v. *Edwards*, *supra*, 7 Cal.2d 1096, 1104.)

Similarly, in the instant case the contraband was concealed in paper sacks within the barrels, and was not visible without emptying or searching through the barrels' content. The fact that the officers did not examine the contents until the trash had been placed

> into the well of the refuse truck does not distinguish *Edwards*, for at no time did defendants' trash lose its "identity" by being mixed and combined with the "conglomeration" of trash previously placed in the truck. Under such circumstances, we hold that defendants had a reasonable expectation that their trash would not be rummaged through and picked up by police officers acting without a search warrant.
>
> Of course, one must reasonably anticipate that under certain circumstances third persons may invade his privacy to some extent. It is certainly not unforeseen that trash collectors or even vagrants or children may rummage through ones trash barrels and remove some of its contents. However, as stated in *People* v. *McGrew*, 1 Ca.3d 404, 412 [82 Cal.Rptr. 473, 462, P.2d 1], "The hotel guest may reasonably expect a maid to enter his room to clean up, but absent unusual circumstances he should not be held to expect that a hotel clerk will lead the police on a search of his room."

And the analysis of the majority in *Krivda* was recently followed in Hawaii, in the case of *People* v. *Tanaka*, 701 P.2d 1274 (1985). Noting that the various Federal Circuit Courts had held otherwise, the Supreme Court of Hawaii construed its own Constitution to preclude warrantless trash searches. In so holding, the court observed, *Id.*, 701 P.2d at 1276-1277:

> In light of the facts in these cases, we believe defendants' expectations of privacy are ones society is prepared to recognize. People reasonable believe that police will not indiscriminately rummage through their trash bags to discover their personal effect. Business records, bills correspondence, magazines, tax records and other telltale refuse can reveal much about a person's activities, associations, and beliefs. If we were to hold otherwise, police could search everyone's trash bags on their property without any reason and thereby learn of their activities,

associations, and beliefs. It is exactly this type of overbroad governmental intrusion that Article I, § 7 of the constitution compels us to agree with Professor LaFave when he said:

> [this] type of police surveillance . . . should not go unregulated, for a society in which all "our citizens" trash cans could be made the subject of police inspection" for evidence of the more intimate aspects of their personal life upon nothing more than a whim is not "free and open."

LaFave, Searches and Seizures § 2.6(c) at 378 (1978) (footnote omitted) (quoting *People* v. *Krivda*, 5 Cal.3d 357, 367, 468 P.2d 1262, 1269, 96 Cal. Rptr. 62, 69 (1971)).

II.

The fact that we hold the defendants have reasonable expectation of privacy in their trash bags does not mean that the police were powerless to search defendant's trash bags. It simply means that absent exigent circumstances, the police will have to have a search warrant based on the probable cause. *State* v. *Dias*, 62 Haw. 52, 56, 609 P.2d 637, 640 (1980).

To equate placing one's trash out for collection with abandonment, moreover, is unreasonable. As observed in LaFave, "Search and Seizure, A Treatise on the Fourth Amendment," 2nd ed. 1987, § 2.6(c), p. 477:

> Though the court in *Edwards* implied that defendant had not really abandoned the items in the trash cans, the more significant part of the holding is that which recognizes there can be a justified expectation of privacy in garbage. It does seem clear that Edwards had abandoned the objects he placed in his trash cans; unlike the defendant in *Work*, he demonstrated an unequivocal intent to part with them forever. But this is not determinative. A justified expectation of privacy may exist as to items which have

> been abandoned in the property law sense, just as it is true that no such expectation may exist on some occasions even though the property has been abandoned. (Fn. omitted.)

In the present case, Petitioner factually exhibited an expectation of privacy. His trash was placed out for collection on the day of expected regular pick up. (J.A. 32) the trash was contained in apparently opaque plastic garbage bags. (J.A. 6, C.T. 101-102) Respondent's reasonable expectation was that the trash collector would pick up the bags shortly after they had been deposited for collection, and would intermingle the items with other trash, and would thereafter deposit mixed trash at an appropriate dump site. Members of the general public would not be able to see into the dark plastic bags; the bags would not be on the street long enough to make likely its inspection by anyone.

It is at this point, however, that governmental conduct intervened; for the officers herein waylaid the opaque containers, by instructing the trash collector to keep Respondent's trash separate, to not comingle it with others' trash, and to deliver said trash to the officers. The nature of the governmental intervention in the trash collection process at this juncture is both revealing, and perhaps determinative, of the issues in this case.

For the fact that the officers had to act at that precise moment on the day of the trash collection underscores Respondent's reasonable expectations as to what would occur with respect to his trash once it was placed out for collection. It was to be picked up shortly thereafter, and taken to the dump. Illustrative is the fact that, on one of the occasions, the collector had not maintained several of the bags separate from other trash, and Petitioner's trash became irretrievable. (C.T. 147-149, J.A. 8.)

Equally as important, the timing and details of the government's intervention with the collection process serves particularly to define the relationship of Respondent, the trash collector, and the government. In placing his trash out for collection, Respondent entrusted the collector with a duty he could well have done for himself. That he entrusted this task to the trash collector, and consented to (and inferrably paid for) the trash collector to take the bags for the purpose of depositing them at the dump cannot be equated with a consent that the collector give the bags to the police instead.

It is in this context that Petitioner seeks to have this Court apply the rationale of Federal Circuit Court decisions holding that, because trash collectors or scavengers might be able to examine a person's trash, it should be viewed as not entitled to Fourth Amendment protection. (e.g., *United States* v. *Shelby, supra; United States* v. *Terry, supra.)*

Further support for this proposition is found in the dissenting opinion of Justice White in *California* v. *Rooney, supra*, 483 U.S. at:

> Respondent knowingly exposed his betting papers to the public by depositing them in a trash bin which was accessible to the public. Once they were in the bin, he no longer exercised control over them. While he may not have welcomed intrusions, respondent did nothing to ensure that his refuse would not be discovered and appropriate. Indeed, he placed his papers in the bin for the express purpose of conveying them to third parties, the trash collectors, whom he had no reasonable expectation would not cooperate with the police.
>
> * * *
>
> Any distinction between the examination of trash by trash collectors and scavengers on the one hand

> and police on the other is untenable. If property is exposed to the general public, it is exposed in equal measure to the police. It is clear from Ciraolo that the Fourth Amendment does not require the police to avert their eyes from evidence of criminal activity that any member of the public would have observed, even if a casual observer would not likely have realized that the object indicated criminal activity or would not likely have notified the police even if he or she had realized the object's significance. It may of course be true that a person minds an examination by the police more than an examination of an animal, child, a neighbor, a scavenger, or a trash collector, but that does not render the intrusion by the police illegitimate.

This concept is closely related to the proposition that, if a citizen wishes to maintain the privacy of his refuse, he should dispose of it on his own, either by incinerating it himself, or by shredding or grinding it. (*United States* v. *Shelby, supra; United States* v. *Terry, supra.*)

It is respectfully submitted that the analysis evident in those cases cannot properly be applied.

First, the record in the present case does not support such an application; however open to general public inspection trash placed in a communal trash bin may be, the same cannot be said of opaque trash bags placed outside of a single family residence shortly before its expected collection and disposal.

Second, the analysis evident in those cases is, it is respectfully submitted, circuitous; it assumes the premise that there is no expectation of privacy, and tends to equate an effective right of privacy with the question of who owns the most efficient incinerator or paper shredder. The realities of modern life in this country are otherwise. Millions of Americans place their trash out for

collection on the appropriate day, expecting that the personal secrets contained therein will be forever buried at the local dump. They have neither time, nor the money, to handle their own waste disposal.

Third, the remote possibility, on the facts of this case, that scavengers or animals may have had access to Respondent's trash in that short interval after it was placed for collection, and prior to its actual collection, adds little to this analysis. For that remote possiblility serves only to demonstrate that Respondent's expectation of privacy, while reasonable, may not have been absolutely certain. The lack of absolute certainty in privacy expectations, however, does not support a finding that the privacy expectation was unreasonable. As observed by Justice Scalia in his concurring opinion in *O'Conner* v. *Ortega*, 480 U.S. ___, ___, 107 S.Ct. 1492, 1505 (1987):

> It is privacy that is protected by the Fourth Amendment, not solitude. A man enjoys Fourth Amendment protection in his home, for example, even though his wife and children have the run of the place—and, indeed, even though his landlord has the right to conduct unannounced inspections at any time. Similarly, in my view, one's personal office is constitutionally protected against warrantless intrusions by the police, even though the employer and coworkers are not excluded.

Further, virtually no dimunition of an expectation of privacy can properly be inferred from the fact that Respondent entrusted his trash to a collector who might thereafter have cooperated with the police. Some support for a dimunition in the expectation of privacy can be found in the dissenting opinion of Justice White in *California* v. *Rooney, supra*, 483 U.S. at ___, and see *U.S.* v. *Shelby, supra; U.S.* v. *Crowell, supra; U.S.* v. *Terry, supra*. The analysis in these cases might properly apply if the trash

collector had, on his own initiative, searched Respondent's trash, and delivered incriminating results to the police. Under such circumstances, the trash collector's search would involve no state action, and would not involve Fourth Amendment considerations. But even this analysis would apply only if the trash collector was not acting as an agent of any governmental official. As observed by Justice Stevens in his opinion in *United States* v. *Jacobsen* 466 U.S. 109, 113-114 (1984):

> This Court has also consistently construed his protection as proscribing only governmental action; it is wholly inapplicable "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *Walter* v. *United States*, 447 U.S. 649d, 662, 65 L.Ed.2d 410, 100 S.Ct. 2395 (1980) (Blackmun, J., dissenting). (Fn. omitted.)

In the present case, no private search occurred in fact. The trash collector clearly acted at the request of the police. Moreover, even if the rationale of a private search were applied, the government's utilization of the seized materials could not properly exceed the scope of the private search. *United States* v. *Jacobsen*, *supra*, 466 U.S. at 115; *Walter* v. *United States*, 447 U.S. 649, 657 (1980). Applied to the facts of the present case, the private party, i.e., the trash collector, conducted no search. Any governmental search would be within the ambit of the Fourth Amendment.

More apt in this context is this Court's holding in *Stoner* v. *California*, 376 U.S. 483 (1964), where in this Court held that while a motel guest implicitly consents to entry into his room in the performance of their janitorial duties, he does not consent to their authorization for a police

search. In so holding this Court observed, *Id.*, 376 U.S. at 489-490:

> It is true, as was said in Jeffers, that when a person engaged a hotel room he undoubtedly gives "implied or express permission" to "such persons as maids, janitors or repairmen" to enter his room "in the performance of their duties." 342 U.S. at 51, 96 L.Ed. at 64. But the conduct of the night clerk and the police in the present case was of an entirely different order. In a closely analogous situation the Court has held that a search by police officers of a house occupied by a tenant invaded the tenant's constitutional right, even though the search was authorized by the owner of the house, who presumably had not only apparent but actual authority to enter the house for some purpose, such as to "view waste." *Chapman* v. *United States*, 365 US 610, 5 L.Ed.2d 828, 81 S.Ct. 776. The Court pointed out that the officer's purpose in entering was not to view waste but to search for distilling equipment, and concluded that to uphold such a search without a warrant would leave tenant's home secure only in the discretion of their landlords.

By parity of reasoning, when a citizen places his trash out for collection on the designated pick up day, he would reasonably expect that his refuse would be intermingled with other trash, and thereafter forever buried at the local dumpsite. It is quite unreasonable to assume that such a person expressly or impliedly gives consent to the trash collector to deliver his trash, intact or otherwise, to the police for inspection.

Finally, the reasonableness of Respondent's expectation of privacy must be seen in the context of applicable state law. For to the extent that notions of a reasonable expectation of privacy must rest in part on those expectations that society will accept as reasonable, the pronouncements of that society on the subject should not be

ignored. Were Respondent living in an area in which trash was by law made available for public inspection on a regular basis, no expectation of privacy could be considered reasonable.[3] However, in a State in which a citizen is held to have a reasonable expectation of privacy in his trash, which state laws will protect from governmental invasion, it would seem that Fourth Amendment analysis should recognize the citizen's expectation of privacy as reasonable.

California is such a state. California by constitutional provision,[4] protects a citizen's right to be free from unreasonable searches and seizures, which has been interpreted to prohibit the kind of governmental search which occurred in this case. *People* v. *Krivda* (1971) 5 Cal.3d 357. And California has a separate constitutional provision protecting a citizen's right to privacy which is declared to be an inalienable right. California Constitution, Article I § 1.[5] California's interpretation of those provisions is binding on this Court. See *Uphaus* v. *Wyman*, 364 U.S. 388, 389 (1960).

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[3] Assuming, of course, the validity of the state regulation. See, e.g., *New York* v. *Burger* 482 U.S., ____, (1987)

[4] California Constitution, Article I § 13, provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

[5] California Constitution, Article I § 1 provides:

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

Since the advent of Article I § 28(d), of the California Constitution, a California Court no longer has a state exclusionary rule to provide a remedy for violations of state laws, although Article I § 28(d) does not by its terms alter existing state law as to the validity of any search or seizure. *In re Lance W.* (1985) 37 Cal.3d 873, 886-887.

The question thus posed is that of whether or not a right of privacy, guaranteed by state law, is enforceable directly or indirectly under the Fourth and Fourteenth Amendment exclusionary rule. For several reasons, it is respectfully submitted that this question should be answered in the affirmative.

First, there is precedent for this Court's application of state law to determine the validity of a search or seizure for Fourth Amendment purposes.

Although in part commanded by act of Congress, this Court noted in the case of *U.S.* v. *Di Re*, 332 U.S. 581, 589 [68 S.Ct. 222, 226, 92 L.Ed.210] (1948):

> We believe, however, that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity. By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be "agreeably to the usual mode or process against offenders in such state." There is no reason to believe that state law is not an equally appropriate standard by which to test arrests without warrant, except those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest.

(In accord, *Miller* v. *United States* 357 U.S. 310, 305, 2 L.Ed.2d 1332, 1336 78 S.Ct. 1190 (1958); *U.S. Watson*,

423 U.S. 411, 420 fn.8, 46 L.Ed.2d 598, 607 96 S.Ct. 820 (1976).)

Federal circuit decisions do not appear unanimous on this issue, and its resolution would appear to depend largely on the particular context involved. As noted in *U.S.* v. *McNulty* 729 F.2d 1243, 1251 (10th Cir. 1983):

> We do not say that federal courts need never construe or apply state law. Where the circumstances dictate the propriety of applying state law, it will be recognized. An example of this *United States* v. *Dudek*, 530 F.2d at 690. The failure of Ohio police officers to file a timely report and a verified inventory was held (in *Dudek*) to not require vitiation of an otherwise validity executed search warrant issued under Ohio law. A dearth of federal law on the issue in question is one such constraint. *United States* v. *Re*, 332, U.S. 581, 589-91, 68 S.Ct. 222, 226-27, 92 L.Ed. 210 (1948). In that case, the Court ruled that state law governed the propriety of seizure of evidence of a federal crime by a state officer working with a federal officer, because there was insufficient federal law on the question of warrantless arrest. More to the point here, a relevant federal statute may prescribe reference to state law in certain instances. Cf. Fed.R.Evid. 501 (privilege in certain actions to be determined in accordance with state law). Thus a careful examination of title III. The federal wiretap statute, is necessary here. (Fn. omitted.)

(See also, *U.S.* v. *Mitchell*, 783 F.2d 971, 973-974 (10th Cir. 1963) holding Federal Law controlling: cf. *Mason* v. *United States* 719 F.2d 1485 (10th Cir. 1983) referring to state law; *U.S.* v. *Rickus*, 737 F.2d 360 (3rd cir. 1984), holding federal law controlling.)

And, in a series of cases dealing with wiretap evidence some courts have relied on state law, since the issue involved the basic right of privacy, particularly when state

officers act pursuant to a state warrant. As stated in *U.S.* v. *Manfredi*, 488 F.2d 588, 598 (2nd Cir. 1973):

> In dealing with the question of the validity of the warrants themselves, clearly a question of state law, it will be recalled that the Crodelle affidavit submitted to the state court judge in support of the petition seeking the wiretap order contained an agreement "to limit the seizure of conversations to those specifically pertaining to the aforementioned Penal Law violations." (Fn. omitted.)

But this doctrine concededly is not without its limitation. As stated in *U.S.* v. *Jarabek*, 726 F.2d 889, 900 (1st Cir. 1984):

> *Curreri* involved a state investigation with the use of wiretap equipment authorized by a state court order. Federal officials became involved only after the wiretapping was completed. The analysis in this case, upon which appellant's rely, must be read in the context of the court's observation that a stricter state statute regarding wiretap interception will be applied by a federal court only in the event electronic surveillance is conducted pursuant to a state court authorization. *Curreri* provides no support for appellant's claim.
>
> We have found no federal case that has relied on state law in judging the admissibility of evidence of intercepted communications in any circumstances other the where the electronic surveillance was conducted pursuant to a warrant or order. On the other hand, a number of cases stand for the proposition that in federal criminal trials, regardless of any violation of state law, the admissibility of wiretap evidence always is a question of federal law. E.g., *United States* v. *Butera*, 677 F.2d 1376, 1380 (11th Cir. 1982), *cert. denied*, ___ U.S. ___ (1983); *United States* v. *Horton*, 601 F.2d. 319 323 (7th Cir.) *cert. denied*, 444 U.S. 937 (1979); *United States* v. *Nelligan*, 573 F.2d.

> 251, 253 (5th Cir. 1978); *United States* v. *Shaffer*, 520 F.2d 1369, 1371-2 (3d Cir. 1975) (per curiam), *cert. denied*, 423 U.S. 1051 (1976). In the instant case it is not necessary for us to rest our decision upon this proposition, for here we have federal officers who performed their duties in a lawful manner in a joint investigation. The mere involvement of state officers is not sufficient reason to look to state law to determine the admissibility of interception evidence. (fn. omitted.)

(See also, *United States* v. *Henderson*, 721 F.2d 662, 664 (9th Cir. 1983); *United States* v. *Alexander*, 761 F.2d 1294, 1298, (9th Cir. 1985); *U.S.* v. *Kovac*, 795 F.2d 1509, 1511 (9th Cir. 1986); *United States* v. *Day*, 455 F.2d 454, 455 (3rd Cir. 1972); state law controlling; *United States* v. *Little*, 753 F.2d 1420 (9th Cir. 1984) federal law controls in federal proceedings.)

Second, to hold that the Fourth Amendment exclusionary rule applies to exclude evidence obtained in violation of a right of privacy guaranteed by a state constitution does not necessarily hold more than that the reasonableness of a citizen's expectation of privacy is determined in large measure by state law. Once it is determined that state law has declared an expectation of privacy to have been reasonable, the criteria for the application of the Fourth Amendment's exclusionary rule would appear to have been met. (See *California* v. *Ciraolo*, *supra*, 476 U.S. at ___; *Oliver* v. *United States* 466 U.S. 170, 177 (1984); *O'Connor* v. *Ortega*, *supra* 480 U.S. ___, ___.)

And on one final ground California's interpretation of its own constitutional right of privacy should control the disposition of this case. Even if this Honorable Court were to hold that, in the absence of state law considerations, the Fourth Amendment does not preclude trash searches such as those in the present case, it is re

spectfully submitted that this Court should hold that the Fourth Amendment, as applied to the states through the Fourteenth Amendment, compels application of the exclusionary rule for violations of at least fundamental state constitutional rights. In *Mapp* v. *Ohio*, 367 U.S. 643 (1961) this Honorable Court held the exclusionary rule was essential to the enforcement of the right of privacy, and without the rule, the right was rendered "a form of words" and illusory. This Court therein stated, Id., 367 U.S. at 655-656:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from the state invasions of privacy would be so ephemeral and so neatly severed from conceptual nexas with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."
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> * * *
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> In short, the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.

For the foregoing reasons, this Court in *Mapp* held that the Due Process Clause of the Fourteenth Amendment

compels application of the exclusionary rule to searches by state officers.

The holding in *Mapp* cannot reasonably be limited to violations of rights recognized under federal, but not state law. For a state cannot, consistent with the Due Process Clause, create an "Inalienable" right of privacy, and thereafter render that right meaningless and unenforceable.

That the Due Process Clause applies to enforce rights which have their origin in state law, is now beyond dispute. This Court so held, in *Vitek* v. *Jones*, 455 U.S. 480, 488.

> We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment. There is no "constitutional or inherent right" to parole, *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 7 99 S.Ct. 2100, 2103, 60 L.Ed.2d 668 (1979), but once a State grants a prisoner the conditional liberty properly dependent on the observance of special parole restrictions, due process protections attach to the decision to revoke parole. *Morrissey* v. *Brewer*, 408 U.S. 471, S.Ct. 2593, 33 L.Ed.2d 484 (1972). The same is true of the revocation of probation. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). In *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), we held that a state-created right to good-time-created right to good-time credits, which could be forfeited only for serious misbehavior, constituted a liberty interest protected by the Due Process Clause. We also noted that the same reasoning could justify extension of due process protections to a decision to impose "solitary" confinement because "[it] represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a

> major act of misconduct." *Id.*, at 571-572, n. 19, 94 S.Ct. at 2982, n. 19. Once a State has granted prisoners a liberty interest, we hold that due process protections are necessary "to insure that the state-created right is not arbitrarily abrogated." *Id.*, at 557 94. S.Ct. at 2975. (*Id.*, 445 U.S. at 488-489).

This principle was also recognized by Justice Rehnquist in his opinion in *Hewitt* v. *Helms*, 459 U.S. 460, 466, (1983).

> While no State may "deprive any person of life, liberty, or property, without due process of law," it is well settled that only a limited range of interests fall within this provision. Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States. *Meachum* v. *Fano* 427, U.S. 215, 223-227, 96 S.Ct. 2532, 2537-2540, 49 L.Ed.2d 451 (1976).)

California has by its Constitution, and by its judicial interpretations thereof, recognized a citizen's right to privacy; it has recognized that the right to privacy precludes controlled trash seizures and searches such as those in the present case. Having created such a "personal liberty interest," the state cannot, consistent with the Due Process Clause of the Fourteenth Amendment, arbitrarily render that personal liberty interest a meaningless "form of words." (*Mapp* v. *Ohio*, supra, 367 U.S. at 655.)

Accordingly, the exclusionary rule of the Fourth and Fourteenth Amendments must be applied to exclude evidence seized in violation of personal liberty interests recognized by a state to be "inalienable." The privacy of one's refuse is so recognized in California.

CONCLUSION

At issue herein is a basic right to privacy versus the simple requirement that California State Law Enforce-

ment Officers obtain a search warrant, at least in the absence at any exigency. There is no compelling need to dispense with the requirement of probable cause and a warrant in situations wherein no exigency exists.

To hold otherwise is to allow unfrettered government monitoring of the most intimate details of the lives of citizens. To avoid such monitoring and surveillance, a citizen would have to either keep his refuse, or dispose of it by his own means. For the vast majority of our citizens, these alternatives are not feasible. But even more importantly, to hold valid such monitoring is to hold that, in order to maintain freedom from government snooping, a citizen must carefully screen and scrutinize that which leaves his residence. This would be an unwarranted and dangerous precedent, inconsistent with concepts of a free society. The same rationale could be utilized to authorize the monitoring of chimney emissions, plumbing, and other indicia of a householder's lifestyle. Balanced against the pervasive nature of the governmental intrusion is the relatively minor burden on law enforcement of obtaining a search warrant, or, where exigent circumstances intervene, of demonstrating probable cause. This latter burden seems a small price to pay to maintain basic right of privacy.

Further, in the unique posture at the present case, it is respectfully submitted that no state can be allowed to declare a right of privacy to be fundamental and inalienable, and arbitrarily render that right meaningless and unenforceable by not applying an exclusionary rule to evidence seized in violation of that right. Under such circumstances, the Due Process Clause of the Fourteenth Amendment should mandate exclusion.

The decision of the Court of Appeal should be affirmed.

Respectfully submitted,

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